MENG LEONG DEVELOPMENT PTE. LTD.

v.

J.I.P HONG TRADING CO. PTE. LTD.

PRIVY COUNCIL
LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
ROBIN COOKE
[APPEAL NO. 24 OF 1983]
15 OCTOBER 1984

CONTRACT: *Specific performance - Contractual property sold to third party before trial - Awarded damages in lieu of specific performance - On appeal damages were substituted by an order for specific performance - Whether respondent estopped from obtaining specific performance.*

Jip Hong Trading Co. Pte. Ltd. the respondent (purchaser) had sued the appellant (vendor) for specific performance of a contract. The appellant, since the date of the respondent's contract, had sold the contractual property to a third party. The learned A.P. Rajah J therefore in lieu of specific performance, awarded damages in a sum of RM297,500 but refused a stay of execution. At the vendor's appeal against the quantum of damages the Court suggested that the purchaser should cross-appeal for specific performance, which the purchaser did. Meanwhile the damages of RM297,500 were placed in deposit awaiting the outcome of the vendor's appeal. The Court of Appeal dismissed the vendor's appeal on quantum, allowed the purchaser's cross-appeal and made an order for specific performance, substituting the order for damages.

The Court of Appeal granted leave to the vendor to appeal to the Judicial Committee against the order for specific performance. But the Board gave special leave to the vendor to appeal against the refusal of the Court of Appeal to grant a stay of execution and granted a stay against the order for specific performance. In the vendor's case to the Board, it was alleged that the purchaser was not entitled to an order for specific performance, because at the trial the purchaser had elected to accept damages in lieu of specific performance and therefore the purchaser was estopped from obtaining specific performance. As regards damages it was argued that they were excessive and should be reduced.

Held:

[1] The order for specific performance made by the Court of Appeal and any consequential orders to be set aside and the order of A.P. Rajah J restored.

[2] There are no grounds upon which the Court of Appeal or the Board could interfere with the amount of damages awarded by the trial Judge.

[3] The costs ordered by the Court of Appeal to be set aside and that there should be no order for any costs incurred by either party after the trial before A.P. Rajah J.

[Appeal allowed.]

Cases referred to:
Cannan v. Reynolds [1855] 5 E and B 301
S. Kaprow & Co. Ltd. v. MacLelland & Co. Ltd. [1948] 1 KB 618
Re Collie [1878] 8 Ch D 807
Ajayi v. R.T. Briscoe (Nigeria) Ltd. [1964] 1 WLR 1326
Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch 392
United Australia Ltd. v. Barclays Bank Ltd. [1941] AC 1
Johnson v. Agnew [1980] AC 367

Other source referred to:
The Law relating to Estoppel by Representation, Spencer, Bower & Turner, 3rd Edn. (1977), para. 310 & 322

JUDGMENT

Lord Templeman:

This appeal arises out of a purchaser's specific performance action. The purchaser is the respondent Jip Hong Trading Co. Pte. Limited. The defendant vendor is the appellant Meng Leong Development Pte. Limited. The action was tried by A.P. Rajah J in the High Court of Singapore. On behalf of the vendor it was submitted at the trial that specific performance could not be granted because the vendor had, since the date of the purchaser's contract, sold the contractual property to a third party who was not before the Court. The learned Judge accepted that submission and awarded damages in lieu of specific performance. The purchaser's contract price was $152,500, the vendor had spent $38,000 on improvements and there was evidence that at the date of the trial the property was worth $488,000. Accordingly, by an order dated 8 September 1981 A.P. Rajah J awarded the purchaser $297,500 damages; he refused a stay of execution. By notice dated 23 September 1981 the vendor gave notice of appeal for the purpose of obtaining a reduction in the damages of $297,500 ordered by the Judge. The purchaser did not give notice of appeal or cross-appeal against the decision of the Judge to deny the purchaser specific performance and to award damages instead. The purchaser shared the mistaken view of the law of specific performance accepted by the Judge. The time allowed by the operative rules of Court for the service of notice of appeal expired in October 1981, subject to the power of the Court to grant an extension of time.

By a letter dated 23 October 1981 the vendor's solicitors wrote to the purchaser's solicitors saying that the purchaser's solicitors had proposed that the vendor pay the $297,500 damages to the Overseas Chinese Banking Corporation on fixed deposit on a three month basis in the name of the purchaser's solicitors to be held by them as stakeholders and to pay over the deposit to the party who succeeded in the pending appeal together with all accrued interest. By a letter dated 28 October 1981 the purchaser's solicitors confirmed these arrangements but added that:

> ... the agreement was reached on the strict understanding that the said sum of $297,500 was to be paid to us immediately without any further delay.
>
> Therefore kindly let us have your clients' cheque of $297,500 on receipt of this letter.

The plain implication was that if the vendor did not deposit the damages of $297,500 the purchaser would proceed to levy execution for this sum. With a letter dated 12 November 1981 the vendor's solicitors sent to the purchaser's solicitors the vendor's cheque for $297,500 pursuant to the agreement:

> ... that in the event that our clients succeed in the pending appeal and damages payable to your clients are reduced, your clients will only be entitled to a proportionate sum of the interest accrued under the fixed deposit. The balance of the interest is to be paid out to our clients.

The vendor's appeal against the quantum of damages came before the Court of Appeal (Kulasekaram, Lai Kew Chai and Chua JJ) on 20 August 1982. The Court pointed out that the purchaser's right to specific performance at the date of the trial could not have been affected by any sale to a third party with notice and suggested that the purchaser should cross-appeal asking for specific performance. The Court of Appeal gave leave to the purchaser to do so and adjourned the vendor's appeal. The Court of Appeal were not on that occasion, or any subsequent occasion, informed by either party that the damages of $297,500 ordered by the learned Judge had already been raised by the vendor and placed on deposit awaiting the outcome of the vendor's appeal as to quantum. By notice of cross-appeal dated 8 September 1982 the purchaser asked that the order of Rajah J should be varied and that specific performance be substituted therefor. On 16 September 1982 the Court of Appeal dismissed the vendor's appeal on quantum, allowed the purchaser's cross-appeal and made an order for specific performance. By a letter dated 17 September 1982 the vendor's solicitors wrote to the purchaser's solicitors saying that:

> As your cross-appeal for specific performance ... has been allowed, kindly release to us our clients' moneys held by you as stakeholders together with interest immediately.

The purchaser declined to release the deposited damages of $297,500 but by a summons dated 5 November 1982 applied for an order giving directions for the conveyance of the property to the purchaser, the delivery up of vacant possession and for the damages of $297,500 to be retained until specific performance had been completed and all moneys and costs due to the purchaser had been accounted for. In support of this application the purchaser's managing director swore an affidavit on 3 November 1982 to which he exhibited all the correspondence between 23 October 1981 and 16 November 1981 which related to the deposit of the damages of $297,500. By an order dated 12 November 1982 Lai Kew Chai J made the order sought by the purchaser's summons. By a notice of motion dated 17 November 1982 the vendor sought leave to appeal to the Judicial Committee against the order for specific performance made by the Court of Appeal and on 22 November 1982 the Court of Appeal gave that leave but refused to stay the order for specific performance. Subsequently the Court of Appeal refused leave to appeal against their order refusing a stay of specific performance. On 9 December 1982 the Board gave special leave to the vendor to appeal against the refusal of the Court of Appeal to grant a stay of execution and granted a stay against the order for specific performance pending the hearing by the Board of the vendor's appeal.

In the appellant's case to the Board, the vendor alleged that the purchaser was not entitled to an order for specific performance because at the trial before A.P. Rajah J the purchaser had elected to accept damages in lieu of specific performance. The vendor sought leave to adduce before the Board evidence as to what had happened at the trial. Their Lordships declined to give such leave; no such election appears from the judgment of A.P. Rajah J or from his notes of evidence.

The documents placed before the Board by the vendor in connection with this appeal properly included the affidavit and exhibits of the purchaser's managing director which disclosed the deposit of the damages of $297,500 and the agreement which had been reached with regard thereto. It was suggested by a member of the Board that the Court of Appeal might not have made an order for specific performance if they had been aware of the deposit of the

damages and the agreement. The vendor's Counsel, Mr. Godfrey, therefore applied for leave to argue that the purchaser was estopped from seeking specific performance after electing to enforce the order for damages made by the trial Judge A.P. Rajah J.

The vendor's application to rely on this estoppel by election was opposed by Mr. Nugee on behalf of the purchaser. All the evidence relevant to estoppel was before the Board and there were no material disputes of fact. After a short adjournment Mr. Nugee was in a position to make submissions concerning estoppel. Accordingly the Board was in a position to decide whether, as a matter of law, the purchaser was estopped from obtaining specific performance but, as Mr. Nugee pointed out, the Board will not, save in exceptional circumstances, permit a point to be taken which has been conceded or not taken before the Court of Appeal especially if, as in the present case, the point is not adumbrated in the relevant case and is put forward for the first time at the oral hearing before the Board. The Board decided to allow the vendor to rely on the argument of estoppel by election.

These proceedings had been bedevilled with mistakes on both sides. The purchaser had been allowed to cross-appeal on grounds which were suggested by the Court of Appeal, in ignorance of the facts. There was then admittedly a month's adjournment, but the attention of the vendor's advisers then, and subsequently, was directed to the problem of whether the purchaser had elected at the trial to accept damages, not to the question whether the purchaser's conduct after the trial gave rise to an estoppel.

The crucial circumstances in the present case were that, if the Board ignored admitted facts which were not made available to the Court of Appeal and which were subsequently put in evidence by the purchaser, and if the estoppel point was good in law, then the Board was in danger of upholding the order of the Court of Appeal for specific performance made *per incuriam* and of approving a result which was unjust and should never have been reached. Any prejudice to the purchaser caused by the fact that estoppel was not adumbrated until hearing of this appeal can be corrected by an appropriate order for costs. Their Lordships consider that the proper course is to decide the issue of estoppel by considering whether it would have been proper for the Court of Appeal to have granted the purchaser an order for specific performance in September 1982 if the Court of Appeal had been aware of all the facts relating to the deposit of damages on the terms imposed by the purchaser.

Mr. Godfrey submitted that after the award of damages by the trial Judge, A.P. Rajah J, the purchaser had a choice. The purchaser could either enforce the judgment for damages or appeal to the Court of Appeal to set aside the order for damages and to substitute an order for specific performance. The purchaser elected to take the benefit of the Judge's order and force the vendor to provide the damages. The purchaser thereby abandoned the right to appeal and was estopped from asserting any such right thereafter.

In Spencer, Bower and Turner *"The Law relating to Estoppel by Representation"* 3rd Edn. (1977) para. 310 summarises the doctrine of election as applied to the law of estoppel in these terms:

> Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the Trial Judge and relinquished the right to appeal for that order to be set aside and for specific performance to be substituted. The vendor altered its position to its detriment by raising and paying $297,500 on 12 November 1981. The vendor has been deprived of that sum ever since. After the judgment of A.P. Rajah J the purchaser was indeed confronted with two alternative and mutually exclusive courses of action, namely, to enforce the award of damages or to seek to persuade the Court of Appeal to set aside the award of damages and to substitute the remedy of specific performance.

By procuring the payment of the damages of $297,500 the purchaser accepted the Judge's order. If the purchaser had served a notice of appeal seeking specific performance or had informed the vendor that the purchaser intended to seek an order for specific performance from the Court of Appeal, the vendor would have been able to refuse to place the damages on deposit and would have been entitled to renew and to succeed in an application for a stay of execution with regard to the damages pending the hearing of the purchaser's appeal seeking specific performance.

Paragraph 322 of the cited work by Spencer, Bower and Turner relating to election in the conduct of litigation is in these terms:

> Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residues.

Mr. Nugee submitted that this statement is not justified by authority but it appears to be good law and good sense. Here the purchaser, by obtaining the deposit of the damages of $297,500, took the benefit of the decision in its favour made by A.P. Rajah J and thereby precluded the purchaser from arguing that his decision was erroneous.

With commendable speed, Mr. Nugee and those assisting him, prepared and submitted a supplemental case for the respondent denying that the purchaser was estopped by election from appealing against the order of the trial Judge. From the thoroughness of that supplemental case and from the detailed oral arguments put forward by Mr. Nugee, for which their Lordships are indebted, it appears that the purchaser's advisers were able to consider and to deal fully with the arguments of the vendor relating to estoppel, despite the tardy appearance of the claim. Mr. Nugee submitted that no election arose. He said the demand by the purchaser for the deposit of the damages of $297,500 ordered by the trial Judge was only a prudent method of obtaining security for those damages and did not imply or necessitate abandonment by the purchaser of its right to appeal against that order out of time and to obtain an order for specific performance from the Court of Appeal.

If the Court of Appeal dismissed the purchaser's appeal, then the purchaser would remain entitled to the damages awarded by the trial Judge and in the meantime was entitled to security for the payment of those damages. The argument is misconceived. If the purchaser had appealed against the order of the trial Judge and sought specific performance, the vendor would have been entitled as of right to a stay of the order for damages and would have refused to raise and deposit those damages pending the appeal. This follows from the fact that if the purchaser had appealed, the property comprised in the contract would have remained security for the obtaining by the purchaser of specific performance and for the alternative and mutually exclusive remedy of damages. The purchaser would not be entitled

to a further $297,500 in cash as well as the contractual property by way of security. If the purchaser had appealed the vendor and any person claiming through the vendor would not have been able to dispose of the property pending the appeal. If, in due course, the Court of Appeal were otherwise minded to refuse specific performance, the Court could and would have declined to do so unless the vendor secured payment to the purchaser of the damages of $297,500 by a charge on the property or payment into Court or by some other method.

The property was worth $488,000 at the date of trial and the damages were only $297,500. Mr. Nugee said that property values might have fallen between 8 September 1981, the date of the trial, and 20 August 1982, the date of the hearing of the appeal. The purchaser's present eagerness for specific performance indicates that the property did not in fact fall below $297,500 in value. But in any event the risk of loss between 8 September 1981 and 20 August 1982 would have been created by the purchaser's appeal and that risk would have been borne and suffered by the vendor and not by the purchaser. If the property became or was likely to become worth less than $297,500 the purchaser could at any time abandon the appeal and enforce against the property and any other assets of the vendor the order for damages of $297,500. The purchaser, by appealing, would automatically deprive the vendor, and any other person asserting an interest in the property, of the power to dispose of the property at an advantageous time at the advantageous price of $488,000 while the purchaser retained the right to abandon the appeal if the property became less valuable than the damages. The vendor in those circumstances would be left with the property as its reduced value of less than $297,500 and would still be liable to pay the full damages. Thus, the purchaser by appealing, could ensure that the property then worth $488,000 could not be sold or otherwise turned to advantage pending the appeal.

The purchaser was secured by the forced retention of the property. In these circumstances a demand by the purchaser for the vendor to provide a further $297,500 in cash by way of additional security would have been mere impudence. The purchaser was only entitled to enforce the order for damages in lieu of specific performance if the purchaser abandoned the right to appeal against that order. The purchaser elected to enforce the order for damages by procuring payment from the vendor of the full amount of the damages. It is true that the damages were placed on deposit in the name of the purchaser's solicitors but this was due to the fact that the vendor was pursuing an appeal against the quantum of damages.

The purchaser relied and could only rely on the order of A.P. Rajah J to enforce payment of the damages of $297,500 by the vendor to the purchaser's solicitors as stakeholders. By relying on that order the purchaser lost the right to dispute it. By demanding and procuring payment of the damages of $297,500 the purchaser abandoned any claim to specific performance. Mr. Nugee submitted that the vendor never even alleged any belief that the purchaser had abandoned a claim for specific performance. But actual intentions and beliefs are irrelevant to the raising of an estoppel in the present case. The facts which raise an estoppel are that the purchaser demanded and accepted payment of the damages, and thus acted in a manner which was only consistent with acceptance of the decision of the trial Judge and only consistent with abandonment of the right to appeal against that decision. Factually, it is plain that the purchaser did accept the decision of the trial Judge and had no intention of appealing until the Court of Appeal, in ignorance of any estoppel by election, suggested that the purchaser was labouring under a mistake of law in accepting that decision. The vendor had already altered its position by raising and paying $297,500 and the essential requirements for estoppel by election were satisfied.

Next, Mr. Nugee argued that, subject to the purchaser releasing the deposited damages and interest and possibly paying damages to the vendor for any loss caused to the vendor by raising and placing the money on deposit in the first place, the purchaser could reverse the election made in November 1981 and resume the claim to specific performance. But in the absence of any misconduct on the part of the vendor, the Court could not permit the purchaser to escape from the consequences of the election constituted by the demand made and enforced for payment of the damages payable pursuant to the order made by the trial Judge. There is no equity which assists the purchaser to forego that demand and to cancel that election freely exercised in a manner which the purchaser subsequently regretted.

In a detailed and careful argument Mr. Nugee referred to a number of cases on which he relied by way of analogy for his submission that the purchaser, notwithstanding any earlier election, could restore the right to appeal against the order for damages made by the trial Judge by offering to release the damages on deposit together with interest and possibly damages. But on examination, the cases on which Mr. Nugee relied did not support the submission.

First, Mr. Nugee referred to the jurisdiction of the Court to set aside a judgment on the application of the person by whom it has been obtained, before or after the time for appealing has expired, and before or after execution. The authorities cited, namely, *Cannan v. Reynolds* [1855] 5 E and B 301, *S. Kaprow & Co. Ltd. v. MacLelland & Co. Ltd.* [1948] 1 KB 618 and *Re Collie* [1878] 8 Ch D 807, are instances where judgment was obtained or action was taken under a mistake and where that mistake could be corrected without injustice. In the present case the purchaser did not make any mistake, except a mistake of law as to the grounds of specific performance and that mistake cannot now be corrected without injustice to the vendor. The authorities do not support the view that a litigant who has elected to enforce a judgment for damages and to abandon the right to appeal against that judgment may change his mind after the damages have been paid.

Secondly, Mr. Nugee relied on the principle of promissory estoppel and in particular on the case of *Ajayi v. R. T. Briscoe (Nigeria) Ltd.* [1964] 1 WLR 1326. But in that case, and in similar cases, the promise was not intended to be irrevocable and the recipient of the promise did not act to his detriment.

Thirdly, Mr. Nugee relied on the fact that in ordering rescission of a contract for misrepresentation or undue influence the Court only insists on substantial restitution accompanied, if necessary, by payment of compensation: *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch 392. There must however be substantial restitution even in such a case where the Court is striving by the order of rescission to protect an innocent party against a wrong-doer. In the present case the purchaser exercised an unfettered election to accept the damages payable pursuant to the order of A.P.Rajah J or to appeal against that order. Moreover substantial restitution is impossible because no one knows what would have happened to the vendor's assets if the vendor had not been compelled by the purchaser to raise and deposit $297,500 by way of damages. It was said that there was no evidence that the vendor had any difficulty in finding the money or that the rate of interest earned on the deposit was any less than the interest which might have been earned by the vendor. If necessary, it was said, there could be an inquiry as to the damages suffered by the vendor in raising and paying and being deprived of the use of $297,500. But it is impossible to put the clock back; the damages would be imponderable and any inquiry would inflict on the vendor uncertainty, delay and expense merely to relieve the purchaser against the consequences of the purchaser's own voluntary conduct in insisting on payment of the damages and enforcing the order of the trial Judge.

Mr. Nugee submitted that in any event no election could arise until a final order, not subject to appeal, had been made:

> ... on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment:

per Lord Atkin in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] AC 1 at p. 30, cited with approval by Lord Wilberforce in *Johnson v. Agnew* [1980] AC 367 at 396.

It is true, of course, that the purchaser was not bound to make an election; the purchaser could have appealed against the order of the Judge and retained the right to elect between specific performance and damages until after any final appeal. But in that case the vendor could not have been compelled to raise and deposit $297,500. The purchaser chose to elect to enforce the order made by A.P.Rajah J immediately after the date of that order and thereby abandoned the right to appeal against that order.

Accordingly, their Lordships conclude that if the Court of Appeal had been aware of the payment of damages of $297,500, the Court of Appeal would have been bound either to refuse the purchaser leave to cross-appeal or to dismiss that cross-appeal.

Finally, Mr. Nugee submitted that a cross-estoppel arose because the day after the Court of Appeal gave judgment for specific performance the vendor's solicitors asked for the release of the damages held on deposit. It was said that the purchaser assumed that the vendor was accepting the decision of the Court of Appeal and therefore issued a summons for implementation of the decree for specific performance. However, the purchaser insisted on retaining the damages while pursuing implementation of the order for specific performance and knew full well from the date when the vendor sought leave to appeal to the Board that the decision of the Court of Appeal was under challenge. There was no election by the vendor, no estoppel, and the purchaser by seeking to implement the order for specific performance did not act to its detriment in reliance on any act or omission by the vendor or at all. The purchaser sought to implement the order for specific performance in reliance on the order made by the Court of Appeal. Indeed the events which happened after judgment of the Court of Appeal only illustrate the justification for the application of the principle of estoppel by election which prevented the purchaser from appealing against the order of A.P. Rajah J once the purchaser had enforced that order and procured the deposit of the damages. By retaining the damages and also seeking to enforce the order for specific performance, the purchaser was enabled to pursue inconsistent and alternative claims. The vendor was only liable to pay damages or to perform the contract and was not bound to suffer the infliction of both remedies, even with the hope of recovering from the effect of one of them in due course, subject to any order the Court might care to make about costs or delay. The vendor having been obliged by the purchaser to comply with the order to pay damages was harassed by the order for specific performance. Once the damages had been raised and paid and accepted the purchaser was estopped by election from appealing against the order for the payment of those damages.

On behalf of the vendor, Mr. Godfrey argued that the damages awarded by A.P. Rajah J were excessive and should be reduced. The vendor's appeal to the Court of Appeal for such a reduction had not been heard on its merits. He asked that the issue as to the quantum of damages should be referred back to the Court of Appeal or should be made the subject of an inquiry. He said that the written judgment of A. P. Rajah J did not explain the basis on which the damages were calculated. Examination of the record, however, makes the matter quite plain. The learned Judge rightly decided that damages should be assessed as at the

date of trial. Mr. Godfrey said that it was arguable that damages should have been assessed at an earlier date when the vendor repudiated the contract. But that repudiation was not accepted; the purchaser issued a writ for specific performance. There is nothing in this point.

As to the quantum of damages, there was one expert witness called by the purchaser who gave evidence of value at the date of trial. He assessed that value at $488,000. Mr. Godfrey frankly conceded that the Judge must have accepted that evidence, deducted from the value of $488,000 the value namely, $38,000 of certain improvements, carried out by the vendor, deducted the contract price of $152,500 payable by the purchaser pursuant to their contract of purchase and thus arrived at the damage award of $297,500. The only evidence of value on behalf of the vendor was given by the managing director of the vendor who, *inter alia*, said that adjoining property had been sold for much less than $488,000. The learned Judge must have rejected this evidence and preferred the evidence of the expert valuer. The Judge was entitled so to do. There are no grounds upon which the Court of Appeal or the Board could interfere with the amount of damages awarded by the trial Judge.

In the result, their Lordships will allow the appeal from the Court of Appeal. The order for specific performance made by the Court of Appeal and any consequential orders must be set aside and the order of A.P. Rajah J restored.

There remains the question of costs. If the vendor had produced to the Court of Appeal the facts relating to the deposit, then the Court of Appeal would have been bound either to refuse to allow the purchaser to cross-appeal or, if the facts had been revealed after leave had been granted, to dismiss the cross-appeal and to refuse to grant specific performance. The vendor's appeal against quantum of damages would have been dismissed. Before the Board, the vendor has succeeded, but only on a ground raised for the first time on the day when the appeal was opened. In the circumstances, their Lordships consider that the orders made by the Court of Appeal with regard to costs should be set aside and that there should be no order for any costs incurred by either party after the trial before A.P. Rajah J.

Dissenting Judgment of Sir Robin Cooke:

Not being persuaded that this case should be decided on a point never mentioned in its long history until stated by one of their Lordships at the hearing of the final appeal, I have the signal misfortune to differ from the majority and would dismiss the appeal.

At first sight the course taken by the Court of Appeal in suggesting specific performance and giving the purchaser liberty to cross-appeal seems unusual; but that course was apparently not opposed on behalf of the vendor, and the Court records in its reasons for judgment that Counsel for the vendor frankly admitted that he saw no reason why specific performance could not have been ordered.

At the lowest, it is a reasonable inference that the parties and their legal advisers in Singapore did not regard the arrangement for payment of the damages to stakeholder as an election. Indeed, even in the vendor's case before the Judicial Committee, settled by leading Counsel in London, the arrangement was nowhere mentioned - and notwithstanding that the subject of election (allegedly at the trial) was by then in the forefront. Such relevant evidence as there is may be incomplete. The Judicial Committee does not have the benefit of any opinion from the Court of Appeal about the significance of the arrangement as between the parties. In all these circumstances it is difficult to see any firm basis for concluding that, by insisting that the deposit arrangement be carried out, the purchaser induced the vendor to believe

that the purchaser had relinquished any claim to specific performance. Moreover, Mr. Godfrey accepted before their Lordships that it was too late to contend that the arrangement amounted to an agreement to forego specific performance.

All this might not matter if there were an overriding rule of law that in no circumstances can a purchaser who has been awarded damages at first instance require, as a term of some arrangement, that the damages be deposited with a stakeholder, or paid into Court, without *ipso facto* electing against specific performance. With the greatest respect to those who may favour such a rule, I cannot help thinking that it would go too far.

In the present case, after the initial judgment the vendor applied for a stay, which was refused by the High Court. Next the vendor filed a notice of motion in the Court of Appeal for a stay. The correspondence (letters of 23, 28, 30 October and 4, 12 and 16 November 1981) shows that a bargain was then reached that, if the damages were paid to a stakeholder, execution of the judgment would be stayed pending the outcome of a vendor's appeal. By previously opposing a stay, except on such terms, the purchaser did not commit itself to executing the judgment. Evidently the purchaser in fact took no step towards execution, nor does there even appear to be evidence of a clear threat of execution. What the vendor gained by the bargain was that the purchaser no longer had the **option** of taking any steps to enforce the judgment (as by winding-up proceedings).

I agree that the principles are correctly stated in the chapter on Election in Spencer, Bower and Turner on *"Estoppel by Representation"*, 3rd Edn., a chapter which may be said to be of special authority, having been substantially rewritten by Sir Alexander Turner. But a theme of the chapter is that election must be unequivocal, the alternative courses of action in truth mutually exclusive. Looking at the known facts of the present case in the light of those tests, I think that to be satisfied that the doctrine applies one should require, like Hamlet, "grounds more relative than this".

Also found at [1985] 1 CLJ 20

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